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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

VIRGINIA CONDE,

Plaintiff and Appellant,

v.

WARREN CONDE etc., et al.,

Defendants and Respondents.

G040237

(Super. Ct. No. A236420)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Geoffrey T. Glass, Judge. Reversed with directions.

Law Office of John K. York and Celinda Tabucchi for Plaintiff and Appellant.

Warren Conde, in pro. per., for Defendant and Respondent Warren Conde.

Harold Conde, in pro. per., for Defendant and Respondent Harold Conde.

Virginia Conde appeals from an adverse judgment in this action for breach of trust and breach of a no contest clause in the M. Theresa Conde Living Trust (trust). The defendants are her siblings, who are the other beneficiaries of the trust – Warren Conde, Harold Conde, Arthur Conde, William Conde, and Mary Therese Osburn (collectively, the siblings, unless otherwise indicated). Virginia argues various errors compel reversal. We agree this action, and a prior one, did not violate the no contest clause or preclude Virginia from recovering a bequest she is entitled to under our prior decision. So we reverse with directions to fix the amount due Virginia and enter judgment accordingly.

### FACTS

This is the second time we consider the trust created by M. Theresa Conde (Mrs. Conde) in 1993 for the benefit of her six children. Mrs. Conde died in 2000 after having amended the trust six times. In a 2001 action by Virginia against her siblings, we upheld the third amendment that gave Virginia a small house and an *intervivos* gift of certain shares of stock. We struck down the fifth and sixth amendments, which took away the house and stock gift, on the ground they had been obtained by the undue influence of Warren and Harold. Our opinion directed the trial court to enter judgment that the third amendment and stock gift were valid and divide the trust assets accordingly. (*Conde v. Conde* (Jan. 5, 2005, G032067 [nonpub. opn.] pp. 14-15.)

The trial court (Judge Monarch) entered a new judgment on April 25, 2005. The judgment did not specify the sum of money to be distributed to Virginia under the third amendment. Instead, it provided “the findings of undue influence . . . made in connection with the [t]hird [a]mendment and . . . gift of stock are . . . eliminated. The balance of the trust estate shall be divided accordingly.”<sup>1</sup>

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<sup>1</sup> The judgment on remand is found in the superior court file in the prior case, which we examined for the period after this court issued its remittitur on March 30, 2005.

We turn to events that led to the instant action, some of which reach back to a time before the commencement of the prior action. Mrs. Conde resigned as sole trustee of the trust in 1999, succeeded by Warren and Arthur. In 1999, when Virginia was caring for Mrs. Conde and at odds with her siblings, Warren filed a petition for a domestic violence protection order against Virginia, alleging she was a threat to her mother. Sometime prior to June 1, 2001, Virginia knew the trustees planned to sell the small house, relying on the then-unchallenged fifth and sixth amendments. On June 1, 2001, Virginia filed a lis pendens against the property and commenced the prior action to rescind the fifth and sixth amendments. Warren and Arthur, as trustees, responded with a cross-complaint that alleged undue influence by Virginia in obtaining the stock gift, financial abuse, and infliction of mental suffering. A contract to sell the house was signed in August 2001, and after the lis pendens was expunged, the sale closed in 2002. Our prior opinion, upholding the bequest of the small house to Virginia, was filed on January 5, 2005. (*Conde v. Conde, supra*, G032067.)

Virginia commenced the instant action in March 2006. The complaint set out two causes of action. The first alleged Warren and Arthur breached their duties as trustees when they refused to distribute either the small house or its proceeds to Virginia, and again when they failed to provide an annual accounting. The second cause of action alleged the siblings violated a no contest clause in the third amendment when they sought the 1999 restraining order against Virginia, defended the prior action, and filed the cross-complaint in the prior action. The relief sought was removal of Warren and Arthur as trustees, appointment of Virginia in their place, an accounting, a declaration the siblings had forfeited their interests as beneficiaries, and punitive damages against Warren and Arthur.

The siblings' answers alleged Virginia also had violated the no contest clause by filing the prior action and the present one. A joint statement of controverted issues listed this as one of the questions for decision.<sup>2</sup>

The matter was tried by the court (Judge Glass). In a statement of decision, the court found after the 2002 sale, the trustees had distributed the proceeds and the rest of the estate as directed in the sixth amendment (five shares to the other siblings, with one of them divided between a sibling and a granddaughter). It observed "each beneficiary signed a pledge acknowledging . . . they might have to return the distribution if Virginia's trust challenge was successful." The court found the trustees were not personally liable for failing to distribute the small house in kind after Mrs. Conde died in 2000, the proceeds after the 2002 sale, or the proceeds after our 2005 opinion. In both 2000 and 2002, it said, the fifth and sixth amendments (which revoked that gift) were extant. It said the 2005 conduct was not a breach of trust because the trust limited the trustees' liability to willful misconduct or gross negligence, and Virginia failed to offer sufficient evidence to prove either.

But, it found that following our decision in the prior case, "the trustees now have an obligation to distribute the estate of [Mrs. Conde] in accordance with her 3rd amendment, which might require the beneficiaries to return a portion of the distribution made in 2002. This procedure was contemplated by the receipts signed by all recipients." Continuing, it said "absent any valid defense, Virginia Conde would be entitled to the net proceeds from the sale less her prorated share of any death taxes and any expenses related to the real property[,] plus any rent collected or any interest actually earned on the proceeds while in the trust before distribution, with interest on that amount from 120 days after the time the court of appeal found . . . she was entitled to recover under the 3rd amendment."

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<sup>2</sup> The responses and joint statement do not appear in the record. We know of them from our examination of the superior court file, undertaken to fill in gaps left by a scant record.

The trial court determined the no contest clause was such a defense. It said “[Virginia’s] attack on the 5th and 6th amendments in 2001, whether successful or not, violated the no contest [clause] in the 3rd amendment,” as did the instant action, so she was not entitled to anything under the trust. The court found Warren and Arthur had breached the no contest clause as well when they filed the cross-complaint in the prior action, but it declined to impute their conduct to the remaining siblings, who had not joined in the cross-complaint.

The judgment declared Virginia, Warren, and Arthur were not entitled to receive anything from the trust, save for Mrs. Conde’s inter vivos stock gift to Virginia. Distributions from the trust were to be divided equally among the remaining three siblings (except Mary Therese Osburn had to divide her share with her daughter as provided by the trust) “unless . . . the remaining beneficiaries, or any of them, agree to some other resolution.”

## DISCUSSION

Virginia argues neither action violated the no contest clause. She asserts the prior action was exempt because she acted with probable cause in contesting amendments that benefitted Harold, who drafted them, and Warren, who asked Harold to prepare them. (Prob. Code, § 21307.)<sup>3</sup> Her position is the instant action did not run afoul of the provision because it did not attack the trust. We agree.

The no contest clause was added by the third amendment. As relevant, it provides as follows: “No-Contest Provision. If any beneficiary under this [t]rust in any manner, directly or indirectly . . . contests or attacks this instrument or any of its provisions or seeks to impair or invalidate any part or provision of the [s]ettlor’s ‘[e]state [p]lan,’ any share or interest given to that contesting beneficiary under this [d]eclaration of [t]rust is revoked and shall be disposed of in the same manner provided as if that

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All subsequent statutory references are to the Probate Code unless otherwise indicated..

contesting beneficiary had predeceased the [s]ettlor. For these purposes, the [s]ettlor's [e]state [p]lan includes . . . this [d]eclaration of [t]rust, including all [a]mendments thereto . . . .

“For these purposes, the words ‘contest’ and ‘attack’ include, but are not limited to, any claim asserted against. . . the [t]rust or any assets encompassed within the [s]ettlor's [e]state [p]lan, the [s]ettlor's [e]state, the [t]rust, or any assets encompassed within the [s]ettlor's [e]state [p]lan . . . based on any of the following: [¶] . . . [¶] . . . undue influence [¶] . . . [¶] duress, menace, or fraud [¶] . . . [¶] [or] any tort claim . . . .

“The [t]rustee is expressly authorized to vigorously defend, at the expense of the [t]rust, any contest or attack against the [s]ettlor's [e]state [p]lan. . . .”

Section 21307 provides a no contest clause does not apply to an attack on a provision that benefits one who participated in drafting it. “A no contest clause is not enforceable against a beneficiary to the extent the beneficiary, with probable cause contests a provision that benefits any of the following persons: [¶] (a) A person who drafted or transcribed the instrument; [¶] (b) A person who gave directions to the drafter of the instrument concerning dispositive or other substantive contents of the provision or . . . to include the no contest clause in the instrument, but this subdivision does not apply if the transferor affirmatively instructed the drafter to include the contents of the provision or the no contest clause.”

We conclude section 21307 exempts the prior action from the reach of the no contest clause. Virginia brought that action to set aside the fifth and sixth amendments, which had revoked the bequest of the small house to her. Her success established probable cause. The evidence also showed those amendments benefitted two of the siblings who had directed and/or prepared those amendments: “Warren Conde spoke with his mother about making changes to the trust. At his request, Harold Conde, an attorney, prepared the fifth amendment . . . and the sixth amendment . . . . Warren brought them to Mrs. Conde for signature.” (*Conde v. Conde, supra*, G032067, at p 7.)

So bringing the prior action did not run afoul of the no contest clause, since it falls within the section 21307 exemption.

Harold contends the exemption does not apply because the prior action was brought against all of the siblings, and it asserted multiple causes of action beyond undue influence (the other claims were elder abuse and constructive fraud). But no supporting legal authority is cited, so we deem the point waived. (*Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115.)

Moreover, the language of the statute does not support such a narrow reading. The exemption applies where a beneficiary contests “a provision that benefits . . . [¶] (a) *A person* who drafted or transcribed the instrument; [¶] (b) *A person* who gave directions to the drafter . . . .” (§ 21307, italics added.) Nothing in this language requires the action to be brought against *only* the person who drafted the instrument or gave directions to the drafter. The requirement is the existence of a self-serving provision included by a drafter or one who directed him. The statute includes no limitation on who the action is brought against, or what causes of action are asserted, and we are unable to discern a reason for such a limitation. So the presence of other siblings as defendants, and other causes of action beyond undue influence, do not preclude application of the exemption.

Harold argues the exemption does not apply because he did not draft the fifth and sixth amendments, and Warren did not direct him to do so. Rather, he asserts, both merely assisted Mrs. Conde in carrying out her wishes, in his case preparing a draft for Mrs. Conde to review, and in Warren’s taking the draft to an independent attorney to finalize. But no record citations support these assertions, so this point, too, is waived. (*Mansell v. Board of Administration* (1994) 30 Cal.App.4th 539, 545.)

We also conclude the present action does not run afoul of the no contest clause. The first cause of action, for breach of fiduciary duty, sought removal of Warren and Arthur as trustees and asked for an accounting. This did not contest the trust, but

rather sought to enforce it, which does not violate a no contest clause. (See *Betts v. City National Bank* (2007) 156 Cal.App.4th 222, 233-234 [cause of action for breach of fiduciary duty is not a claim to set aside trust].) So, too, the second cause of action, which sought to declare the siblings violated the no contest clause by bringing the counterclaim in the first action. Here Virginia sued to enforce a trust provision, not to contest the trust or its terms, so her action did not breach the no contest clause.

In view of our prior decision upholding the third amendment, and our conclusion the no contest clause does not bar recovery in this action, the trial court's finding in Virginia's favor must control. As found by that court, she is entitled to the net proceeds from the sale of the small house, plus rent collected prior to the sale and interest on the proceeds prior to distribution to the other siblings, less her prorata share of any death taxes and other expenses related to the property not deducted in arriving at the amount of net proceeds, along with interest from 120 days after our prior decision.

The judgment appealed from is reversed. The trial court is directed to determine the amount of the net proceeds from the sale of the small house, plus rent collected prior to the sale and interest on the proceeds prior to distribution to the other siblings, less Virginia Conde's prorata share of any death taxes and other expenses related to the property not deducted in arriving at net proceeds. The trial court is directed



to enter judgment for Virginia Conde in the amount so found, together with interest commencing 120 days after our decision in the prior appeal. Virginia Conde is entitled to costs on appeal.

BEDSWORTH, J.

WE CONCUR:

SILLS, P. J.

O'LEARY, J.